

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

ROOSEVELT MEMORIAL MEDICAL CENTER,

Employer

Case No. 27-RC-8002

and

AFSCME MONTANA STATE COUNCIL #9, AFL-CIO,

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as "the Act," a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as "the Board."

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Undersigned.

Upon the entire record in this proceeding, the Undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that Roosevelt Memorial Medical Center, herein called "the Employer," is a Montana corporation engaged in the operation of a health-care facility in Culbertson, Montana. During the past 12-month period the Employer received gross revenues in excess of \$250,000. During that same 12-month period the Employer purchased and received goods and services at its Culbertson, Montana facility valued in excess of \$5,000 directly from suppliers located outside the

State of Montana. I find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Further, I find that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The parties stipulated, and I find, that AFSCME Montana State Council #9, AFL-CIO, herein called "the Petitioner," is a labor organization within the meaning of Section 2(5) of the Act.

4. Petitioner petitions for a unit of full-time and regular part-time registered nurses and licensed practical nurses. The Board has held that registered nurses are "professional employees" within the meaning of Section 2(12) of the Act, and that licensed practical nurses are "technical employees." Centralia Convalescent Ctr., 295 NLRB 42 (1989); Washington Nursing Home, 321 NLRB 366, 369 (1996). In accordance with Section 9(b) of the Act, which prohibits the Board from including professional employees in a unit with nonprofessional employees unless a majority of the professionals votes for inclusion in such a unit, I make the following unit determinations:

- a. If a majority of the full-time and regular part-time registered nurses vote for inclusion in the same unit with the full-time and regular part-time licensed practical nurses, the following employees will constitute a unit appropriate for the purposes of collective bargaining: all full-time and regular part-time registered nurses and licensed practical nurses employed by the Employer at its facility located in Culbertson, Montana; excluding confidential employees, guards, supervisors as defined in the Act, and all other employees.

- b. If a majority of the full-time and regular part-time registered nurses do not vote for inclusion in the same unit with the full-time and regular part-time licensed practical nurses, the following two groups of employees will constitute separate units appropriate for collective bargaining: Group A: all full-time and regular part-time registered nurses employed by the Employer at its facility located in Culbertson, Montana; excluding confidential employees, guards, supervisors as defined in the Act, and all other employees; Group B: all full-time and regular part-time licensed practical nurses employed by the Employer at its facility located in Culbertson, Montana; excluding confidential employees, guards, supervisors as defined in the Act, and all other employees.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of section 9(c)(1) and Section 2(6) and (7) of the Act.

STATEMENT OF FACTS

The Employer's health-care facility in Culbertson, Montana, serves area local communities including Culbertson, Brockton, Troy, and Bainville. The facility provides nursing home services and limited inpatient services. The facility consists of a 44-bed nursing home, a 10-bed hospital, and 4 "swing" beds. There also is a clinic, a 24-hour emergency room, and an ambulance service. The Employer provides home health and immunization services. There are one doctor and two physicians assistants. The average length of stay for non-nursing home patients is less than four days. The facility is the

initial contact point for those who need hospital services. Non-nursing home patients generally are referred to other facilities, if they need longer term care. There are periods when there are no patients in the hospital. The facility operates 24-hours per day, 7 days per week. The Employer employs approximately 100 employees.¹

The highest-ranking official at the facility is Administrator Brent Smith. Smith is responsible for the overall operation of the facility. He makes decisions on layoff, suspension, and recall. Laurie Peppinger serves as Smith's administrative assistant. There are several departments, including nursing, maintenance, housekeeping, laundry, dietary, and administration. Each department has a department head. The department heads attend management team meetings. An eight-person governing board sets policies for the facility. Hospital policies and procedures are set forth in policy/procedure books. The governing board also makes decisions about bonuses, based on the Administrator's recommendations.

The management of the nursing department staff consists of the Director of Nursing ("DON") and Assistant Director of Nursing ("ADON"). Currently, the acting DON is Brenda Hunter. The acting ADON is Clair Brown. For nursing department staff, the DON and ADON handle hiring, firing, scheduling, evaluating, disciplining, and making decisions regarding vacations and pay increases. The DON and ADON report to

¹ The Employer contends that it is not an "acute care hospital" within the meaning of the Section 103.30 of the Board's Rules and Regulations, which defines appropriate bargaining units for such facilities. In agreement with the Employer, I find that the Employer's operation is not an acute care hospital because it is primarily a nursing home. The Employer's hospital has only 10 beds, while the nursing home has 44 beds. Additionally, the hospital sometimes has no patients. The Board's Rules and Regulations provide that "[t]he term 'acute care hospital' . . . shall exclude facilities that are primarily nursing homes" Accordingly, the provisions of Section 103.30 of the Board's Rules and Regulations are inapplicable here.

Administrator Smith. The parties stipulated that the DON and ADON are statutory supervisors who are excluded from the bargaining unit, and the record supports this stipulation. Additionally, the parties stipulated that MDS Coordinator Kelly Markle, Emergency Room Coordinator Selma Stitch, and Director of Community Services Lorine Larson are excluded from the unit, because they are managerial or supervisory personnel. They further stipulated that three casual employees--Home Health Educator Laurie Mattelin, Home Health LPN Laura June Beck, and RN Tanya Haas--are not included in the bargaining unit. While the Petitioner initially sought to include on-call RNs and LPNs in the unit, it withdrew that request at the hearing. There also is a nursing department ward clerk who performs a variety of clerical, reception, and record maintenance duties. The ward clerk position is not part of the petitioned-for unit.

The nursing department staff includes 24 certified nursing assistants ("CNA's"). The CNA's' primary duty is to provide residents with routine daily nursing care and services in accordance with assessment and care plans. Specifically, the CNA's perform patient care tasks such as serving meals, making beds, escorting residents around the premises, putting residents to bed, getting water for them, storing residents' clothes, brushing their teeth and dentures, assisting residents in bathing and showering, giving backrubs, and handling other personal care matters. CNA's must be licensed. They are represented by a union, although a collective-bargaining agreement was not in place at the time of the hearing.

The Employer employs approximately seven or eight licensed practical nurses ("LPN's"). To qualify for the position, the LPN must have graduated from an approved LPN program. The LPN's are licensed with the State of Montana. All of the LPN's,

with the exception of clinic LPN Helen Cristofferson, work primarily in the nursing home. Their main function is to provide direct patient care to residents. They also oversee the CNA's in the performance of their jobs by guiding their work and correcting any mistakes that the CNA's might make in providing patient care services. The LPN's occasionally work in the hospital. Clinic LPN Cristofferson works primarily in the clinic, along with the doctor. Cristofferson works with a receptionist and a medical assistant. She has the receptionist set up appointments for the doctor. Cristofferson also directs the assistant on patient care issues. Cristofferson is subject to the same employee handbook as the other nurses. That handbook includes provisions regarding terms and conditions of employment, including benefits. The department head over the clinic staff is Business Office Manager Sharon Schmitz.

The nursing department also includes approximately four full-time and one part-time registered nurses ("RN's"). To qualify for an RN position with the Employer, an applicant must have graduated from an accredited professional school of nursing and be licensed as an RN in the State of Montana. The RN's work primarily in the hospital and the emergency room. They handle direct patient care. For example, they assess patient and resident health conditions and administer medications and treatments. The RN's have responsibility to ensure the overall care of the residents because, of all the nursing staff members, they have the greatest degree of professional knowledge, experience, and skill. In accordance with that responsibility, the RN's ensure that the LPN's and CNA's provide adequate patient care. Thus, RN's occasionally check on the work performed by the LPN's and CNA's and give them guidance.

The RN's, LPN's, and CNA's work as a team in caring for the residents and patients. The RN's, LPN's, and CNA's assist each other and exchange information. Those personnel, however, have received training that frequently allows them to perform their jobs without guidance from others. Often, they work independently.

The work of the RN's, LPN's, and CNA's is divided among two shifts--the day shift and night shift. The hours of the nursing staff day shift are from 6:00 a.m. to 6:00 p.m. The night shift hours run from 6:00 p.m. to 6:00 a.m. On the day shift, there generally are approximately 1 RN, 2 LPN's, and 5 CNA's. On the night shift, there usually are 1 RN, 1 LPN, and 2 CNA's. No other departments work on shifts, although dietary department employees stay into the evening to handle the evening meal. The Administrator, DON, ADON, and nursing department administrative staff usually work a typical eight-hour day, Monday through Friday. At night and on weekends, the RN charge nurse is the highest ranking staff member. The DON is on call at night and on weekends.

All nursing staff, including RN's, LPN's, and CNA's, may participate in the staff evaluation process. As part of the evaluation process, Administrative Assistant Laurie Peppinger distributes a blank evaluation form to a nursing staff member who is to be evaluated. That employee completes a self-evaluation. Peppinger also may distribute blank peer review forms to other nursing staff members as part of the evaluation process. For example, when a CNA is to be evaluated, Peppinger may have the CNA do a self-evaluation and also might ask another CNA, an LPN, or an RN to fill out a peer review form for that CNA. RN's, LPN's, and CNA's all have submitted peer reviews as part of the Employer's evaluation process. After those materials are completed and gathered, the

DON and ADON review the materials. The DON completes the final evaluations for RN's and LPN's; the ADON does the final evaluations for the CNA's. The DON and ADON decide what to enter on the final evaluations forms; they can decide to ignore the peer reviews.

The Employer has one RN on each shift serve as a "charge nurse." The charge nurse function is not permanently assigned to particular RN's. Rather, the charge nurse function "floats" among the RN's. Thus, each of the RN's periodically serves as charge nurse. The LPN's do not serve as charge nurses. Administrator Smith testified that federal regulations permit the Employer to use LPN's as charge nurses when there are no patients in the hospital. He also testified that he is considering using the LPN's as charge nurses in the future, because it would be cheaper than using RN's. The Employer, however, has not yet had LPN's serve as charge nurses.

The RN charge nurse has authority to call in staff to ensure adequate coverage. In selecting someone to come in, the charge nurse consults a scheduling list. The charge nurse may select a person who lives close to the facility or who will not require overtime pay. The charge nurse does not need to base her decision on an assessment of staff members' skills; the staff members are similarly qualified. The charge nurse does not have the authority to order staff to come in to work. Employees can decline to come in. If the charge nurse needs to call in a nursing staff member who will incur overtime, the charge nurse usually checks first with the DON before calling in that person. Acting DON Hunter testified that she generally does not object to staff incurring necessary overtime. If the charge nurse needs to call in someone from another department, the charge nurse contacts the head of that department. For example, if there is a need to have

someone come in to handle a maintenance problem, the charge nurse contacts the head of the maintenance department.

The charge nurse has the authority to let staff go home early because of sickness or personal needs, such as care of children. Based on the testimony of RN's Joyce Skedsvold and Teresa Witkowski, it appears that such requests are routinely granted.

When work loads require, charge nurses may temporarily move available nursing staff between the nursing home and the hospital. Charge nurses do not have the authority to make permanent changes in work assignments.

Charge nurses have the authority to send home staff members who have abused patients or who are intoxicated or under the influence of drugs, pending investigation by higher authority. The Employer's policy requires such action to protect resident/patient health and safety until the DON or ADON can make a final determination about how to handle the situation. With respect to such infractions, Acting DON Hunter testified that the charge nurse does not have to exercise any discretion in deciding to send the staff member home because policy dictates that result. Additionally, Hunter testified that, under the Montana Nurse Practices Act and the implementing regulations, a charge nurse must take immediate action to deal with a nursing staff member who is under the influence of drugs or alcohol at work. Hunter acknowledged that a charge nurse could lose her nursing license if she failed to act in those circumstances. Charge nurses rarely send employees home. DON Hunter testified that she was aware of only one instance during her tenure as DON in which a nurse sent an employee home for intoxication. The only other instance mentioned by Hunter involved a charge nurse sending an employee

home because the Employer scheduled someone else to cover the employee's shift after the employee previously had missed three shifts in a row.

Charge nurses have the authority to notify the DON about problems with staff that may require discipline. Other staff members, including LPN's and CNA's, have that same authority.

The Employer expects charge nurses to settle some disputes among nursing staff as such issues arise. Acting DON Hunter described such disputes as "spats," "tiffs," and "squabbles." Other witnesses described the disputes in similar terms. To settle such matters, the RN's talk to the involved personnel to see if the problem can be settled on the floor. The record establishes that the nurses do not have the power to order a resolution of such problems. Acting DON Hunter acknowledged that RN's should notify her about problems if they cannot resolve them informally.

In the event of a disaster, such as a tornado, the RN charge nurse is responsible for calling Laurie Peppinger to inform her that more personnel will be needed. The charge nurse generally learns about the existence of the disaster from law enforcement personnel who call the facility. Once Peppinger receives information that there has been a disaster, she calls in personnel from a telephone roster, referred to as a "disaster call tree," that the Employer has prepared. Typically, Peppinger calls department heads. The department heads call the personnel in their respective departments. The charge nurse coordinates the facility's response to the disaster until higher authority takes over. The Employer has promulgated a detailed disaster protocol that sets out staff members' responsibilities. For example, the protocol specifies that the person receiving a disaster call shall obtain pertinent information, report the disaster immediately, page out the

ambulance and fire department, notify staff, and initiate the call tree. The disaster procedure has not been invoked frequently. In approximately the last year, disaster procedures went into effect twice because of tornadoes. An RN who has worked for the Employer for over 30 years testified that she personally has never had to initiate the disaster plan.

The Employer has issued a memorandum stating that, in the absence of the Administrator or the DON, the charge nurse has the authority to deal with any "situations" that should arise.

ANALYSIS AND CONCLUSIONS

The Employer contends that the RN's and LPN's are statutory supervisors who cannot be included in a bargaining unit. It also contends that clinic LPN Helen Cristofferson must be excluded from the unit because she does not share a community of interests with the other nurses. In contrast, the Petitioner takes the position that the RN's and LPN's are employees, not statutory supervisors, and that the clinic LPN appropriately is part of the unit.

1. The Status of the RN's and LPN's

Section 2(3) of the Act excludes "any individual employed as a supervisor" from the Act's definition of "employee," thereby excluding supervisors from the Act's protections. Section 2(11) of the Act defines a "supervisor" as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive, and the possession of any one of the Section 2(11) powers will make one a supervisor. See, KGW-TV, 329 NLRB No. 39, slip op. at 4 (1999). The other requirements, however, are conjunctive; thus, an individual is not a supervisor unless the individual exercises that power with the use of independent judgment and holds the authority in the interest of the employer. Id.

In adding the independent judgment requirement in the definition of "supervisor," Congress sought to distinguish between truly supervisory personnel, who are vested with "genuine management prerogatives," and employees--such as "straw bosses, leadmen, set-up men, and other minor supervisory employees"--who enjoy the Act's protections even though they perform "minor supervisory duties." NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-281 (1974) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)).

Consistent with that congressional intent, the Board is careful not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights. See, KGW-TV, 329 NLRB No. 39, slip op. at 4 (1999). Accordingly, the burden of proving supervisory status rests upon the party who claims that such status exists. See, Bennett Indust., 313 NLRB 1363, 1363 (1994).

In NLRB v. Health Care & Retirement Corp., 511 U.S. 571 (1994) ("HCR"), the Supreme Court rejected the Board's interpretation of the Section 2(11) term "in the interest of the employer" as not including the actions of health care professionals when directing and assigning other employees in furtherance of patient care. The Court acknowledged, however, that other phrases in Section 2(11), including the phrase "independent judgment," are "ambiguous, so that the Board needs to be given ample room to apply them to different categories of employees." Id. at 579. Additionally, the

Court expressly disclaimed any intent to disapprove prior Board and court decisions finding that workers were not supervisors because their direction and assignment of other employees did not involve the use of independent judgment. Id. at 583.

After the Supreme Court's decision in HCR, the Board revisited the issue of the proper construction of Section 2(11) in the context of the status of health care professionals. In Providence Hosp., 320 NLRB 717, 729 (1996) ("Providence"), reaffirmed in Providence Alaska Med. Ctr., 321 NLRB No. 100 (1996), enforced, Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548 (9th Cir. 1997), the Board stated that "the analysis of most cases raising supervisory issues will be made pursuant to the Board's traditional approach of analyzing whether the direction is done with independent judgment." Additionally, in Ten Broeck Commons, 320 NLRB 806, 810 (1996), the Board made clear that it would "treat charge nurses the same as all other employee classifications" and would "apply to them the same test" that it applied to all other employees.

In contending that the RN's and LPN's are supervisors, the Employer relies on their authority to evaluate staff and to assign and direct others in the performance of their work. The Employer also relies on the RN charge nurses' authority to call personnel into work, to allow them to leave early, to transfer staff temporarily, to send personnel home in appropriate circumstances, to notify the DON about problems that could lead to discipline, to resolve staff disputes, and to handle disaster preparations. Further, the Employer relies on the RN charge nurses' status as the highest ranking personnel in the facility at night and on weekends, and on an Employer memorandum stating that charge

nurses have the authority to handle situations that should arise in the absence of higher authority.²

Contrary to the Employer's contention, I find that the RN's and LPN's role in evaluating staff does not make them supervisors. Section 2(11) does not list "evaluate" as one of the 12 identified supervisory functions. Accordingly, preparation of evaluations, without more, cannot confer supervisory status. See, Waverly-Cedar Falls Health Care, 297 NLRB 390, 392 (1989), enforced, 933 F.2d 626 (8th Cir. 1991); Ohio Masonic Home, 295 NLRB 390, 393 (1989). The Board's policy is that a worker's role in evaluating coworkers is not supervisory unless those evaluations "lead directly to personnel actions affecting those employees, such as merit raises." Ten Broeck Commons, 320 NLRB 806, 813 (1996). Alternatively, "for evaluations to constitute evidence of supervisory status they must effectively recommend personnel action." Northcrest Nursing Home, 313 NLRB 491, 498 (1993). "[A]uthority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." Children's Farm Home, 324 NLRB 61, 61 (1997). In this case, the RN's and the LPN's merely participate in a peer review process. Those peer reviews do not lead directly to personnel actions such as merit raises, nor do the peer reviews constitute effective recommendations of personnel action. While the DON and ADON consider the peer reviews, the record evidence establishes that the DON and ADON make their own

² The Employer also contends that the LPN's should be deemed to be statutory supervisors, because the Employer is considering using them, as well as the RNs, as charge nurses. That contention is meritless, as the decision as to supervisory status must rest on analysis of the authority that a worker does have, not of the authority that the worker may acquire. In any event, as discussed below, the authority that charge nurses have is not supervisory within the meaning of Section 2(11).

independent determinations about what goes in the final evaluations. Thus, the peer reviews that the RN's and LPN's provide serve "primarily a reporting function[.]" not a supervisory one. Beverly Enterprises v. NLRB, 148 F.3d 1042, 1046-1047 (8th Cir. 1998). The fact that the CNA's also provide peer reviews as part of the Employer's evaluation process bolsters the conclusion that participation in the peer review process is not supervisory. If participation in the peer review process were sufficient to confer supervisory status, then the CNA's also would have to be considered statutory supervisors. In short, the Employer's entire nursing staff would consist of supervisors, an obviously unrealistic situation.

The authority of RN's and LPN's to assign and direct other workers in the performance of discrete patient care tasks also fails to establish that the RN's and LPN's are statutory supervisors. Under the Board's traditional approach of analyzing "independent judgment," the Board has "distinguished supervisors who share management's power or have some relationship or identification with management from skilled non-supervisory employees whose direction of other employees reflects their superior training, experience, or skills." Providence, 320 NLRB 717, 729 (1996). Accord, Ten Broeck Commons, 320 NLRB 806, 811 and n.10 (1996). As the Board stated in Providence, 320 NLRB at 729:

Section 2(11) supervisory authority does not include the authority of an employee to direct another [employee] to perform discrete tasks stemming from the directing employee's experience, skills, training, or position, such as the direction which is given by a lead or journey level employee to another or apprentice employee, the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training, and the direction which is given by an employee with specialized skills and training to coordinate the activities of other employees with similar specialized skills and training.

In particular, since "making decisions requiring expert judgment is the quintessence of professionalism," the "mere communication of those decisions and coordination of their implementation do not make the professional a supervisor." Id. Here, the RN's and LPN's authority to direct other staff stems from their greater experience, skills, and training, and is incidental to the performance of their own patient care responsibilities. Accordingly, I find that the RNs' and LPNs' authority to direct other staff does not make them supervisors. See, e.g., Vencor Hosp.-Los Angeles, 328 NLRB No. 167 (slip op. at 4) (1999); Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548, 552 (9th Cir. 1997); VIP Health Serv., Inc. v. NLRB, 164 F.3d 644, 648-649 (D.C. Cir. 1999).

The Employer also contends that the RN's are supervisors because, in their capacity as charge nurses, they call in staff when the need arises. As discussed above, however, the RN charge nurse simply selects the name of a staff member from a scheduling list, based on factors such as proximity to the facility and whether the staff member will incur overtime. The performance of that function does not establish the requisite level of judgment for supervisory independent judgment to exist. See, e.g., Evangeline of Natchitoches, Inc., 323 NLRB 223, 224 (1997) (LPNs not supervisors, even though they found replacement employees, because the LPNs followed standard procedure within established guidelines); Providence Alaska Med. Ctr. v. NLRB, 121 F.3d 548, 552-554 (9th Cir. 1997) (finding a replacement employee by "call[ing] employees in to work based on a pre-prepared staffing list . . . is more clerical than supervisory, and [does] not involve the exercise of independent judgment").

Additionally, the RN's do not have the authority to order any employee to come in to work; the employees can refuse to come in. The RN's authority merely to seek out

volunteers underscores their lack of independent judgment. See, e.g., Evangeline of Natchitoches, Inc., 323 NLRB at 224; Providence Alaska Med. Ctr. v. NLRB, 121 F.3d at 553 (nurses not supervisory where they could not order an employee to come in early or work late).

Nor is there any merit to the Employer's contention that RN's are supervisors because they have the authority to let LPN's and CNA's go home early for reasons such as illness, child care, or other personal business. There is no evidence that RN's ever have declined to allow LPN's or CNA's to go home early. In the absence of such evidence, the Employer has failed to show that the function of the RN is anything more than routine, based on a regular, established practice that does not require the exercise of independent judgment. See, e.g., Washington Nursing Home, 321 NLRB 366, 366 n.4 (1996) (charge nurses' authority to permit aides to leave early is routine in nature); St. Francis Med. Ctr.-West, 323 NLRB 1046, 1047-1048 (1997) (decision to approve sick leave did not involve independent judgment where it was "automatic" that employees who requested sick leave received it).

Similarly, the authority of RN's to transfer nursing staff between the nursing home and the hospital does not establish supervisory status. The RN's move personnel merely to balance the existing work load among staff already assigned to the shift by the DON and ADON. Such a common sense adjustment involves the exercise only of routine judgment, not independent judgment. See, e.g., Providence, 320 NLRB 717, 732 (1996) ("[b]alancing work assignments among staff members . . . does not require the exercise of supervisory independent judgment"); Northern Montana Health Care Ctr., 324 NLRB 752, 754 (1997) (authority to transfer aides to remedy coverage problems not

supervisory because such transfers do not involve "anything more than a routine judgment as to the number of aides needed to serve a particular number of patients"), enforced, 178 F.3d 1089 (9th Cir. 1999).

The Employer is equally unconvincing in contending that RN's are supervisors, because they have the authority to send staff home for serious misconduct such as patient abuse, intoxication, or drug use. As discussed above, the exercise of that authority is infrequent. The infrequent or sporadic exercise of such authority is insufficient to confer supervisory status. See, e.g., St. Francis Med. Ctr.-West, 323 NLRB 1046, 1047, 1048 (1997); McDonnell Douglas Corp. v. NLRB, 655 F.2d 932, 937 (9th Cir. 1981).

Moreover, the evidence does not demonstrate that the nurses use independent judgment in deciding whether to send an employee home. Under the Employer's policies and State of Montana nursing laws, nurses have no real choice but to take such action. Under those circumstances, the nurses are merely following and executing predetermined policy, not exercising "independent judgment" with the meaning of Section 2(11). See, e.g., Evangeline of Natchitoches, Inc., 323 NLRB 223, 224 (1997) (LPNs who had authority to send home aides who were incapacitated by alcohol, drugs, or illness deemed not to be supervisors, as "little discretion [was] involved because LPNs are required to take such action"); Mid-America Care Found. v. NLRB, 148 F.3d 638, 643 (6th Cir. 1998) (accepting the principle that "independent judgment cannot be found where decisions are strictly regulated by specific employer policy"). Additionally, the Board typically has found that such authority does not require independent judgment where its exercise is limited to situations involving flagrant or egregious misconduct that endangers patient

health or safety. See, Vencor Hosp.-Los Angeles, 328 NLRB No. 167 (slip op. at 4) (1999).

The RN's are not supervisors based on their authority to notify the DON about problems that may require discipline. Plainly, that notice function is merely reportorial, not supervisory. Such notice does not constitute supervisory disciplinary authority within the meaning of Section 2(11) of the Act, because it does not have any tangible effect on employees' job status and does not necessarily result in adverse action. See, Ten Broeck Commons, 320 NLRB 806, 812 (1996); Northern Montana Health Care Ctr., 324 NLRB 752, 754 (1997), enforced, 178 F.3d 1089 (9th Cir. 1999). Indeed, the CNA's also may notify the DON about problems that might call for discipline, yet the CNA's clearly are not supervisors.

I also conclude that the RNs' involvement in resolving some disputes among staff is not sufficient to establish that they perform a supervisory grievance-adjustment function. The nurses do not participate in any formal dispute resolution procedure, such as a grievance procedure in a collective-bargaining agreement. They have authority only to use their personal relationships with staff members to informally resolve relatively minor problems. Thus, the nurses act essentially as mediators who help remedy problems through a process of mutual consent. Under those circumstances, the nurses do not adjust grievances within the meaning of Section 2(11). See, e.g., Ohio Masonic Home, 295 NLRB 390, 392-393, 394 (1989) (charge nurses' authority to rely on their personal relationships with employees to informally resolve minor complaints insufficient to establish supervisory status); Illinois Veterans Home at Anna L.P., 323 NLRB 890, 891 (1997) (same). Moreover, the Board long has distinguished between acts demonstrating

supervisory authority and those undertaken by employees with the mutual consent of other employees. See, e.g., Washington Post Co., 254 NLRB 168, 205 (1981); Skaggs Drug Ctrs., 197 NLRB 1240, 1240 (1972), enforced, 84 LRRM 1505 (9th Cir. 1973); Peoria Journal Star, Inc., 117 NLRB 708, 710 (1957).

In addition, I find that the RN charge nurses' role in responding to disasters does not make them supervisors. That role is not adequate to create supervisory status because, as set forth above, charge nurses rarely have had occasion to invoke the Employer's disaster plan. See, e.g., St. Francis Med. Ctr.-West, 323 NLRB 1046, 1047, 1048 (1997) (infrequent exercise of authority insufficient to confer supervisory status). Additionally, the charge nurse merely follows predetermined policy by initiating the disaster call tree based on information provided by law enforcement. The charge nurse does not exercise independent judgment in that regard. Moreover, after the declaration of a disaster, Administrative Assistant Peppinger, not the charge nurse, calls in additional personnel. The charge nurse's subsequent coordination of the facility's disaster response is simply an aspect of the performance of her professional duty to provide medical care. See, e.g., Providence, 320 NLRB 717, 729 (1996).

The Employer does not advance its case that the RNs are statutory supervisors by claiming that at various times the RNs are the highest ranking personnel in the building. See, e.g., St. Francis Med. Ctr.-West, 323 NLRB 1046, 1047 (1997) (worker not a supervisor even though he was the highest ranking employee on site during some periods); Highland Superstores, Inc. v. NLRB, 927 F.2d 918, 923 (6th Cir. 1991) (workers were not supervisors even though they were "the highest ranking employees on duty" at times); NLRB v. Res-Care, 705 F.2d 1461, 1467 (7th Cir. 1983) (same).

The Employer's memorandum stating that RN charge nurses have the authority, in the absence of higher authority, to deal with "situations" that may arise also does not satisfy the Employer's burden of proving that the RN's are supervisors. The record does not set forth specific instances in which a charge nurse invoked such authority to take supervisory action within the meaning of Section 2(11) of the Act. Thus, the Employer's memorandum constitutes mere "[t]heoretical or paper power [that] does not a supervisor make." New York Univ. Med. Ctr. v. NLRB, 156 F.3d 405, 414 (2d Cir. 1998) (citing Food Store Employees Union Local 347 v. NLRB, 422 F.2d 685, 690 (D.C. Cir. 1969)). Accord Beverly Enterprises-Massachusetts, Inc. v. NLRB, 165 F.3d 960, 964 (D.C. Cir. 1999).

2. Unit Status of Clinic LPN Helen Cristofferson

In defining bargaining units, the Board focuses on whether the employees share a "community of interests." NLRB v. Action Automotive, Inc., 469 U.S. 490, 494 (1985). Under that test, the Board may consider many factors, including the scale and manner of determining earnings, hours of work and other terms and conditions of employment, supervision, the degree of similarity of qualifications and training and skills, similarity in job functions, the frequency of contact with other employees, integration with the work functions of other employees or interchange with them, the history of collective bargaining, the desires of the affected employees, and the extent of union organization. See, Kalamazoo Paper Box Corp., 136 NLRB 134, 137 (1962).

The record evidence establishes that Clinic LPN Helen Cristofferson shares a sufficiently strong community of interest with the nurses to warrant her inclusion in a bargaining unit with other LPN's. Because all LPN's undergo similar training and face

identical state licensing requirements, there can be little doubt that Cristofferson's qualifications, training, and skills are similar to those of the other LPNs. Additionally, while Cristofferson works away from the other nurses for the most part, it appears that the general nature of the work that she does is similar to the work that the other LPN's perform. Also, Cristofferson and the other LPNs appear to be subject to the same wage scale. They also share common terms and conditions of employment, because the Employer's employee handbook covers them all. Furthermore, there appears to be a significant difference in education, skills, and qualifications between Cristofferson and other clinic personnel, such as the assistant and the receptionist. Finally, the Petitioner seeks to have Cristofferson included in the unit. Those factors militate in favor of placing Cristofferson in the petitioned-for unit.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Undersigned among the Employer's full-time and regular part-time registered nurses and licensed practical nurses at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.³ Eligible to vote are those full-time and regular part-time registered nurses and licensed practical nurses who are employed during the payroll period ending immediately preceding the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic

³ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed.

strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period, and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

The voting in this matter shall be conducted in two voting groups; Voting Group A for professional employees and Voting Group B for nonprofessional employees. The appropriate unit descriptions for the voting groups shall read as follows:

Voting Group A: All full-time and regular part-time registered nurses employed by the Employer at its facility located in Culbertson, Montana; excluding confidential employees, guards, supervisors as defined in the Act, and all other employees.

Voting Group B: All full-time and regular part-time licensed practical nurses employed by the Employer at its facility located in Culbertson, Montana; excluding confidential employees, guards, supervisors as defined in the Act, and all other employees.

The employees in Voting Group A will be asked the following two questions on their ballot:

1. Do you desire to be included in the same unit as licensed practical nurses?
2. Do you desire to be represented for purposes of collective bargaining by AFSCME Montana State Council #9, AFL-CIO?

If a majority of the Voting Group A employees vote "yes" to the first question, indicating a desire to be included in a unit with nonprofessional employees, they shall be so included. Their vote on the second question will then be counted with the votes of the nonprofessional employees in Voting Group B to decide whether to select the Petitioner as the representative for the entire combined voting unit. In that event, the combined appropriate unit shall read as follows:

All full-time and regular part-time registered nurses and licensed practical nurses employed by the Employer at its facility located in Culbertson, Montana; excluding confidential employees, guards, supervisors as defined in the Act, and all other employees.

If a majority of the Voting Group A employees vote "no" to the first question, indicating a desire to not be included in a unit with nonprofessional employees, their ballots will be separately counted to determine whether or not they wish to be represented by Petitioner.

The employees in Voting Group B will be asked only a single question; the same question as Question 2 for Voting Group A.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to

communicate with them. Excelsior Underwear Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the Undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-5433 on or before **February 16, 2000**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **February 23, 2000**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado this 9th day of February, 2000.

Wayne L. Benson, Acting Regional Director
National Labor Relations Board
Region 27
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600 Seventeenth Street
Denver, Colorado 80202-5433

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